49799-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

V.

STEPHANIE MERALDA SALYERS,
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY SUPERIOR COURT CAUSE NO. 16-1-00452-1

PETITIONER'S REPLY

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A. INTRODUCTION TO REPLY

Video does not lie; and, rather than respond to each of the prosecution's ad hominem attacks, Ms. Salyers invites this court to simply watch Exhibit 3, video of the shelter care hearing, and Exhibit 4, video of the police entry into Ms. Salyers home. Exhibit 3 clearly shows Ms. Salyers and Mr. Petrenko walk out of the courtroom *before* the commissioner proceeds to enter a shelter care order in their absence, ex parte. Exhibit 4 plainly shows the facts of the police entry as asserted by Ms. Salyers. Rather than claim that Ms. Salyers' facts had been fabricated, the prosecution had but to simply point to contradictory facts in the videos. They did not.

The prosecution makes the argument that a parent, whose parenting rights had never before been restricted by court order or otherwise, can nevertheless be guilty of First Degree Custodial Interference under 9A.40.060(1) even when (1) a written custody order had not been entered by the court against that parent in the parent's presence, (2) the State produced no evidence that, once entered, the custody order had been properly served upon the parent, (3) the allegedly violated statute applies only to "relatives" who were not parents, and (4) that parent took her own children *not* from someone appointed by the court, but from a person who themselves, did not have "lawful right to physical custody" of the children. The prosecution's argument is legally unsound and bone-chilling in nature

to all law-abiding parents. It presents no legal authority to show that a parent can be guilty of Custodial Interference when she has not been properly served with an order restricting her parental rights.

With respect to ineffective assistance of counsel, the prosecution, on the one hand, states that Ms. Salyers' trial counsel had failed to gather exculpatory evidence in the plea bargaining stage which, in turn, negated the State's possible *Brady* violations. On the other hand, the prosecution argues that trial counsel nevertheless provided effective assistance where (1) he had spent a mere six minutes with his client (2) he advised his client to make an *Alford* plea to a crime based upon violating an order that he had not seen because (per the prosecution) he had "failed to gather" it, and (3) he advised his client, a parent, to plea to the inapplicable "relative" prong when the legislature had differentiated between "parents" and "relatives."

The prosecution makes its argument by inviting the court to speculate as to other possible interactions trial counsel *might* have had with his client, while providing no facts supporting the same. The prosecution's suggestion that he provided effective assistance because he did not admit to doing otherwise is laughable. The prosecution points to no evidence showing effective assistance was provided.

The prosecution argues that Ms. Salyers entered a knowing and voluntary *Alford* plea because her plea was accepted. This argument is

circular and minimizes the necessary consequence of her plea, which was unknown to Ms. Salyers: a five year no contact order with her sons. Ms. Salyers prejudiced by the ineffective counsel because Ms. Salyers, a good mother who had never had her parenting rights restricted, did not know of no contact order consequences and, but for trial counsel's ineffective assistance, would have taken her chances at trial.

Finally, the prosecution then makes a series of objections to several appendices. These objections are without merit in light of the record that is undisputed, not objected to, and incontrovertible.

B. STATE OBJECTIONS BASED ON ALTERNATIVE FACTS NOT IN THE RECORD SHOULD BE IGNORED.

1) COUNSEL SPENT A MERE SIX MINUTES WITH MS. SALYERS.

The State objects to the fact established by Ms. Salyers Declaration in Appendix DD that Counsel spent a mere six minutes advising his client by speculating that defense counsel, Steven Rucker, *might* have spent time with Ms. Salyers over the phone or *might* have had additional meetings with her at the courthouse. However, the prosecution provides absolutely no evidence of jail phone records to show that more time was spent with Ms. Salyers. Further, local judges have recently recognized that the Clark County Court House pit area is not designed for substantive attorney-client discussions; and that the jail should be used for confidential conversations.

> Judge Fairgrieve reported that this issue was raised at the last Judges' meeting and the feedback obtained was that the space in the pit area is not designed for substantive attorney-client discussions to take place. … attorneys should use the jail for confidential conversations.[1]

The prosecution then argues that Mr. Rucker provided effective assistance because he did not sign a declaration admitting to his ineffective assistance. Notably, while pointing to the lack of a declaration from Mr. Rucker, the prosecution has not obtained a countervailing declaration from Mr. Rucker stating that he provided effective assistance. Mr. Rucker has a strong personal interest in showing he provided effective assistance due to having previously been suspended from practice and his felony conviction.[2] [3] He has also had his involvement in public defense, and his three earlier DUI convictions criticized in a Seattle Post-Intelligencer article entitled "Defense for capital crimes often done on the cheap."[4] Following that article, the American Bar Association published a report on the systemic failings of the Clark County Public Defense System, documenting issues with the lack of attorney client interaction and

[1] Hearsay, Clark County Bar Association, page 9, July 2017 (available online at http://www.ccbawashington.org/hearsay/2017_07_Hearsay.pdf (last viewed jul1917).
[2] See https://www.mywsba.org/DisciplineNotice/DisciplineDetail.aspx?dID=463 (Last viewed on July 11, 2017).
[3] Ms. Salyers has no interest in demeaning Mr. Rucker, but "what's past is prologue."
[4] http://www.seattlepi.com/local/article/Defense-for-capital-crimes-often-done-on-the-cheap-1061963.php (last viewed July 11, 2017).

that there was "no penalty or reprimand for poor representation." [5] Earlier this year, Clark County published a presentation on the systemic issues its felony public defense system is facing, including reports that "actual caseload exceeds contract case load."[6] No evidence contradicts the evidence of ineffective assistance.

2) THE E-MAIL FROM SANDRA ALDRIDGE

The prosecution objects to the facts of Aldridge's self-professed modus operandi, specified by her own email, which speaks for itself:

> First move…..turn off MDC
> Second move…..get kid
> THIRD MOVE…..figure out which order you "get" the other people who made this mess!"

Appendix W. No evidence was presented to dispute the authenticity of this email.

C. MS. SALYERS IS COMPLETELY INNOCENT.

Ms. Salyers is completely innocent of violating 9A.40.060 (1) because (1) no child care order existed until it was put in writing, (2) once in writing, the order was not served on Ms. Salyers, (3) Ms. Salyers is a "parent," not a "relative" for purposes of the Custodial Interference statute, and (4) Ms.

[5] https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/indigentdefense/wa_clarkcounty.authcheckdam.pdf (last viewed July 11, 2017), at 14, 20.

[6] https://www.clark.wa.gov/sites/default/files/dept/files/the-grid/081617WS_IndigDef_Reorg.pdf (last viewed on August 15, 2016).

Salyers did not take the children from a person who had "lawful right to physical custody" of the children.

To prove a person is guilty of First Degree Custodial Interference, "The State must establish [1] a custody order existed and [2] the defendant intentionally violated the order." *State v. Boss*, 167 Wash. 2d 710, 719-20, 223 P.3d 506, 511-12 (2009). To prove that a custody order existed, the State must show that the order was put in writing. *State v. Dailey*, 93 Wash. 2d 454, 458-59, 610 P.2d 357, 360 (1980). "A person cannot "intentionally" commit first degree custodial interference without being on notice of the underlying order." *Boss*, at 719-20 (custody order existed where it had been codified in writing). To prove knowledge of the existence of a custody order, the State has the burden to show that a written custody order was properly served upon the affected party. *Boss*, at 719-20; *State v. Kirwin*, 166 Wash. App. 659, 665, 271 P.3d 310 (2012).

1) NO CHILD CUSTODY ORDER EXISTED WHEN MS. SALYERS WAS PRESENT IN THE COURTROOM AT THE SHELTER CARE HEARING.

i. A custody order exists if, and only if the order is in writing.

An order must be codified in writing before it has binding or final effect and power of law. A trial court's oral statements, by contrast, "are 'no more than a verbal expression of [its] informal opinion at that time . . . necessarily subject to further study and consideration, and may be altered, modified, or

completely abandoned." *Ferree v. Doric Co.,* 62 Wash. 2d 561, 567, 383 P.2d 900 (1963). "**Even a trial court's oral decision has no binding or final effect unless it is formally incorporated into findings of fact, conclusions of law, and judgment**." *State v. Dailey*, 93 Wash. 2d 454, 458-59, 610 P.2d 357, 360 (1980) (emphasis added). Only "the written decision of a trial court is considered the court's "ultimate understanding" of the issue presented." *Diel v. Beekman,* 7 Wash. App. 139, 499 P.2d 37 (1972).

For example, in *Doyle v. Taylor*, Doyle appealed the trial court's denial of his contempt motion against opposing counsel, who had allegedly violated the court's oral ruling. *Doyle v. Taylor*, No. 29335-1-III, 2011 Wash. App. LEXIS 2147, at *24 (Ct. App. Sep. 15, 2011). Doyle argued "that the trial court erred in concluding that its oral decision on September 18 was not enforceable." *Id*. at 24. The court of appeals disagreed, holding that where the trial court had orally directed Mr. Doyle's lawyer to prepare a written order, its oral decision was "***nonfinal***, a violation of which would not constitute contempt." *Id*. At 25 (citing CR 65(b), (d) "requiring temporary restraining orders and injunctions to be in writing") (emphasis added).

Accordingly, in *Boss*, copies of the custody and shelter care orders had been provided to the defendant twice prior to her arrest for custodial

interference. *Boss*, at 712-13. The court upheld the defendant's conviction for First Degree Custodial Interference where she had been served with these written orders, thus establishing her knowledge.

The prosecution argues that the existence of a custody order is not necessary by stating that "The term lawful right to physical custody is not synonymous with 'parenting plan' or 'court order.'" Response at 20. However, the lack of synonymy between two terms does not indicate that one of those terms is not proven by the existence of the other. Nor does the erroneously cited *Kirwin* case stand for this proposition. The Washington Supreme Court has very clearly said in *Boss* that to prove First Degree Custodial Interference, "the State must establish a custody order existed . . ." *Boss* at 719-720.

Simply put, a lawful right to physical custody for purposes of the Custodial Interference statute does not exist in the absence of a court order. In *Kirwin*, for example, the court found that "the term 'lawful right to physical custody' necessarily refers to the court-designated custodian of a child when a parenting plan has been entered." *Kirwin*, at 667. It follows from *Kirwin's* reasoning that a person having a lawful right to physical custody of a child has such a right *only because* a written order in the form of a parenting plan or other court order exists.

Moreover, the prosecution's claim that the term "lawful right to physical custody" has a plain meaning according to the legislature that obviates the State's burden to prove the existence of an order in a Custodial Interference case, is unfounded. In fact, the *Kirwin* court noted the ambiguity of the term "lawful right to physical custody," and very clearly held that the father did not have "lawful right to physical custody" of the children *because* he had not been awarded custody by a court order. Significantly, although the father in *Kirwin* was eventually awarded custody by court order, the mother's lack of notice of the existence of the order at the time of the alleged interference immunized her from guilt under 9A.40.060(1).

The prosecution would have us suppose that the State could have an indefinite or permanent lawful right to physical custody of our children even in the absence of a written court order stating the same. This is not the law.

ii. At the time Ms. Salyers left the courtroom, no custody order had been put in writing.

After Ms. Salyers walked out of the courtroom, the commissioner realized that no authority existed at that point "to keep the kids in shelter care over the weekend." Exhibit 3. The order was then put into writing, only after Ms. Salyers had left the court room.

Because a custody order was not put into writing until after Ms. Salyers left the courtroom, that order did not exist such that Ms. Salyers could be

"on notice" of its existence; as in *Doyle* the court's oral statement represented an unenforceable, nonfinal decision.

iii. The Custody Orders were not served upon Ms. Salyers.

Existence of an order is not the same thing as *knowledge of the existence* of the order. An item's existence does not prove the knowledge of its existence. The *Boss* court understood this distinction as common sense, separating the State's burden to show two facts: first, that "a custody order existed *and* [second, that] the defendant intentionally violated the order." *Boss* at 719-20. To establish the defendant intentionally violated a custody order, the State must prove that the defendant was served with notice of the order; the mere existence of the order is insufficient to establish an intentional violation. *Id*; *Kirwin* at 667-68.

For example, in *Kirwin*, the court held that the child custody orders granting the father custody of the children, though lawfully entered, were insufficient to prove that the defendant mother had knowledge of the orders without evidence that the specific, written orders had been served upon her. In fact, the defendant mother had been served with "some" papers that could have been notice of a hearing to change custody status from the defendant to her x-husband under. *Kirwin* at 668 FN2; and *Kirwin,* at 682 FN13 (dissent). Nevertheless, the court found that the State had not met its burden to prove the mother had knowledge of the orders allegedly violated even

though she had left the state with her children after those papers had been served at her home. *Kirwin* at 662.

Under the parenting plan in place in *Kirwin*, the father of the children had visitation rights, but was not the court ordered "custodian" of the children at the time the mother absconded. *Id*. The father was eventually awarded custody of the children through a court modification of the parenting plan and second court order while the mother was out of the state. *Kirwin* at 662. The State produced both of these orders as exhibits to support the conviction of the mother for first degree custodial interference. *Kirwin* at 667. The *Kirwin* court reversed the conviction and held that the State had not established that the defendant was aware of the existence of the order, because, "Neither exhibit gave any indication it had been served on [the mother] . . .." *Kirwin* at 667-668.

In the case at hand, the prosecution erroneously relies on *Boss* to establish that the State need not specifically prove Ms. Salyers' knowledge of the order. The prosecution states that "The [Boss] Court reasoned that when intent to deprive CPS of custody of a child to whom they have a lawful right to physical custody is proven, knowledge of the existence of the order involved in this case is automatically proven." Response at 21.

In *Boss*, however, unlike Ms. Salyers' case, the court had found the the child was in imminent harm and had issued two Custody Orders and a writ

of habeas corpus. *Boss* at 712-713. The State presented evidence that those papers had been physically served by CPS no fewer than three times. *Id*. The mother received written copies of the orders while in custody. Thus, rather than suggest that intent proved knowledge, *Boss* stated the opposite:

> A person cannot "intentionally" commit first degree custodial interference without being on notice of the underlying order. The State must establish a custody order existed and the defendant intentionally violated the order. **The State must establish a defendant is aware of the existence of the order to prove the defendant intentionally violated it.**

Boss at 719-20 (emphasis added).

Accordingly, in *Kirwin*, the court rejected the idea that proper service and knowledge of a custody order could be inferred from circumstantial evidence and proper issuance on the order. It found that, even though the mother had left the state with the children upon being served "some" papers, since the contents of those papers (which *might* have been notice of the hearing to change custody) had not been produced and no other evidence of service of the order existed, the mother's knowledge that a change of custody was likely, could not be inferred sufficient to uphold her conviction. *Kirwin* at 668, see FN2.

Like the prosecution here, the dissenting opinion in *Kirwin,* argued that the defendant's knowledge of the custody order could be inferred from the circumstances; and that the failure to have served the order changing

custody was not dispositive in failing to prove *knowledge* of the order. *Kirwin* (dissent*)* at 682. The dissent argued that the defendant's knowledge could be inferred by (1) evidence that she had been handed papers from her mother and told she must respond in 20 days, but ripped them up, and (2) the fact that, since the trial court had issued an order changing custody to the father, it was presumed to have done so with proper service and calendaring. *Kirwin* (dissent) at 682, see FN13. The *Kirwin* court rejected these arguments and reversed the defendant's conviction.

iv. Neither the Transfer Notice nor the Shelter Care Order was properly served upon Ms. Salyers.

Here, as in *Kirwin*, the State produced no evidence that Ms. Salyers' had been served with the Shelter Care Order or the original Child Custody Transfer Notice prior to her arrest for Custodial Interference. The prosecution argues that "the evidence at trial would have shown that Salyers was informed that her children were being turned over to the custody of DSHS upon her and her husband's arrest." Response at 22. However, they provide no evidence in support of this assertion and Exhibit 2, the Child Custody Transfer notice prepared by Aldridge, plainly states that notice of the transfer was not provided to the parents.[7]

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[7] Significantly, this same Notice of Transfer was discovered only after Ms. Salyers' *Alford* plea and sentence had been entered. Exhibit 2.

2) MS. SALYERS, IS NOT SUBJECT TO THE "RELATIVE" PRONG OF THE CUSTODIAL INTERFERENCE STATUTE AND SHE DID NOT TAKE THE CHILDREN FROM SOMEONE WITH LAWFUL RIGHT TO PHYSICAL CUSTODY OF THE CHILDREN.

A plea is valid in Washington where there is a factual basis to support it. *State v. Padilla*, 84 Wn.App. 523, 928 P.2d 1141 (1997). RCW 9A.40.060(1) prohibits a "relative" of the child, not a "parent," from taking a child from a person or agency who has "lawful right to physical custody" of the child. Here, Ms. Salyers, is a parent, and did not take a child from someone with lawful right to physical custody of them. No factual basis for a plea existed.

i. A parent is not a relative under 9A.40.060(1).

"When the legislature uses different words within the same statute, we recognize that a different meaning is intended." *State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002). "***Neither should different language be read to mean the same thing***." *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007) (emphasis added); *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000). Here, the legislature not only used different words in the same statute, but used different words in the same sentence. For example, the separate terms "relative" and "parent" are used throughout the Custodial Interference statute. Specifically, RCW 9A.40.060(1) states that "A *relative* of a child . . . commits custodial

interference in the first degree if . . . the relative takes . . . the child . . . from a *parent* . . .." (emphasis added). If "relative" and "parent" meant the same thing, the legislature would have simply written ". . . from a relative." See also *Kirwin* at 666-67. It did not.

Moreover, the Custodial Interference Statute is divided into three subsections. RCW 9A.40.060(1)-(3). Subsection one (1) prohibits conduct committed by "a relative of a child." Subsection two (2) prohibits conduct committed by "a parent of a child." Subsection three (3) prohibits conduct of "a parent or other person acting under the directions of the parent." Ms. Salyers is a parent not a relative, and is not subject to the crime for which she was charged and held. No factual basis exists supporting her plea.

ii. Mr. Ricky Salyers did not have "lawful right to physical custody of the children.

Even if Ms. Salyers is subject to the relative prong of the Custodial Interference statute, Ms. Salyers did not violate it because Mr. Ricky Salyers did not have a "lawful right to physical custody" of the children.

A person has "lawful right to physical custody of a child" for purposes of RCW 9A.40.060(1) only where an order has been entered designating that person or agency as having custody of the child. In finding the mother in *Kirwin* had not been properly convicted, the court held "the term "lawful right to physical custody" necessarily refers to the court designated

custodian of a child when a parenting plan has been entered." *Kirwin* at 666-667. In other words, not even a biological father with court established visitation rights, has a "lawful right to physical custody" in the absence of a court order granting him physical custody. Accordingly, in *Boss,* CPS had a lawful right to physical custody of the child because the court had found the child to be in imminent danger, and had entered two separate orders granting CPS custody. See *Boss* at 720-721. In other words, the existence of a custody order proves specifically, that a particular agency or person has a lawful right to physical custody of the children. The order must designate the person or agency to be endowed with lawful right to physical custody.

In Ms. Salyers' case, the person from whom she took her own children did not have "lawful right to physical custody" of them. That is, the Shelter Care Order specified that the children would be placed in custody with CPS or Monica Sigrist and Tiffani Lahmann. Exhibit 2. Ms. Sigrist and Ms. Lahmann were the only two non-CPS employees given "lawful right to physical custody" of the children by the order. Ms. Salyers, however, picked her children up from a Mr. Ricky Salyers.

Thus, Ms. Salyers did not take the children from a person who had "lawful right to physical custody" of them. Nor could she have been put on notice that Mr. Ricky Salyers had "lawful right to physical custody" as he in fact had no such right.

In this regard, it is essential to note that the Shelter Care Order did not preclude Ms. Salyers from any contact with her children. The court could have restrained her from contact in the Order at Section 2.9 and 3.10, but it did not. Appendix C. No allegation of the mistreatment, neglect, or abuse of the children has ever been made against Ms. Salyers.

D. INEFFECTIVE ASSISTANCE AND PREJUDICE

The United States Supreme Court has recently held that the right to effective assistance of counsel applies in the plea-bargaining context. *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); see also, *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010). "A defendant can overcome the presumption of effective representation by demonstrating 'that counsel failed to conduct appropriate investigations.'" *State v. Estes,* 188 Wash. 2d 450, 462-63, 395 P.3d 1045, 1051 (2017).

Counsel must not only research relevant statutes, but must also investigate. *In re Pers. Restraint of Parks*, No. 45348-7-II, 2017 Wash. App. LEXIS 1318, at *19 (Ct. App. June 6, 2017) (conviction reversed where Clark County public defender did not investigate defense). Counsel must research the validity of a custody order because it is "proper exercise of the trial court's 'gate-keeping function' to determine the custody order's validity as a matter of law." *Boss* at 718.

That counsel failed to conduct appropriate investigations into the facts and statutes during the plea bargaining process in this case is demonstrated by (1) the meager amount of time spent with his client, (2) the advisement of his client to plead guilty without having received full discovery (including the custody order which directly exonerated Ms. Salyers),[8] and (3) his advisement of Ms. Salyers to plead guilty to a charge made under an inapplicable prong of the Custodial Interference statute for taking the children from someone who did not have lawful right to physical custody.

1) NO MEANINGFUL CONSULTATION

The prosecution invites this court to speculate that Ms. Salyers might have received additional counsel via a phone call or during a court hearing. Existing evidence, however, shows only that assigned counsel picked up pages 1-16 of the discovery on Friday, March 11th, 2016. Appendix B. Two work days later, on Tuesday, March 15th, 2016, the State sent a plea offer. Appendix M. That same day at 2:00 PM, assigned counsel met with Ms. Salyers for the first (and last) time at the jail where he advised her to plead guilty. Appendix K (Professional Visitor Contact for A Specified Inmate). The meeting lasted six (6) minutes and was conducted on phones while separated by a window. Id. Assigned counsel advised Ms. Salyers

[8] The remaining pages 17-43 of discovery were provided after sentencing and showed plainly that Ms. Salyers had not signed nor been served the Order. Appendix C.

to accept the offer as it 'was the quickest way to see her children.' Appendix DD (Declaration Ms. Salyers). Ms. Salyers' *Alford* plea was made on March 18th, 2016. Appendix EE.

The Prosecution does not respond to *A.N.J.* or *In re Pers. Restraint of Yung-Cheng Tsai*, at all, and fails to show how assigned counsel provided effective assistance at the plea phase.

2) MS. SALYERS WAS PREJUDICED.

The prosecution argues that Ms. Salyers was not prejudiced because she would have been found guilty at trial. However, the United States Supreme Court clarified the prejudice analysis in *Lee v. United States,* holding that the prejudice inquiry during the plea bargaining process necessarily "focuses on a defendant's decision-making, which may not turn solely on the likelihood of conviction after trial." *Lee v. United States*, 198 L.Ed.2d 476, 486 (U.S. 2017); see also *State v. Estes,* 188 Wash. 2d 450, 462-63, 395 P.3d 1045, 1051 (2017) (holding prejudice exists where there is a "reasonable probability that had [the defendant] been fully informed, he would have negotiated a different outcome.")

A defendant is prejudiced by ineffective assistance where there is a reasonable probability that, but for counsel's errors, she would not have pleaded guilty and would have insisted on going to trial. *Lee* at 484. Whether a reasonable probability of the same exists does not turn simply

upon the likelihood of success at trial. *Id*. at 484. Rather, the court must "consider whether the defendant was prejudiced by the denial of the entire judicial proceeding . . . to which [the defendant] had a right." *Id*. at 484 (internal citations omitted). A defendant is so prejudiced where counsel does not advise him of a dire consequence of pleading and where the consequences of taking a chance at trial are not markedly harsher than pleading, such that even the slightest chance of success might be attractive to the defendant. *Id.* at 486.

In *Lee,* the defendant, "***who had no real defense to the charge***, opted to accept a plea that carried a lesser prison sentence than he would have faced at trial." *Id. at* 482 (emphasis added). "Upon learning that he would be deported after serving his sentence, Lee filed a motion to vacate his conviction, arguing that his attorney had provided ineffective assistance." *Id.* at 483. After noting that deportation was the determinative issue in Lee's decision to accept the plea, the Court found that Lee had been prejudiced by ineffective assistance where counsel had failed to advise him of the immigration consequences of his plea. *Id.* at 482-483, 489 (U.S. 2017). Because Lee "demonstrated a reasonable probability that, but for his counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" the Court reversed and remanded so his plea could be withdrawn." *Id.* at 489.

Similarly, had Ms. Salyers but known that the necessary consequence of her plea was so dire: a five year no contact order with her young sons, she would have insisted on going to trial. Further, Ms. Salyers did not benefit from entering a plea agreement since doing so did not reduce her possible sentence range whatsoever. Ms. Salyers was prejudiced not only because she would have been found innocent at trial, but because, had she been advised of the certain consequence of her plea, the loving mother would have insisted on going to trial for even a small chance of success. [9]

E. MS. SALYERS' PLEA WAS NOT KNOWING OR VOLUNTARY.

Where the defendant's guilty plea was not knowing, intelligent, and voluntary because the record did not show the defendant understood an element of the crime, a manifest injustice has occurred. *State v. Sandberg, No. 48787-0-II, 2017 Wash. App. LEXIS 1319, at *6 (Ct. App. June 6, 2017).* Here, Ms. Salyers' Alford plea did not list the elements of the offense and the court did not go over the elements with her at all before accepting her plea. Appendix D & EE. Nor was Ms. Salyers effectively advised of the five year no-contact consequence of her plea prior to the entry of the plea. Appendix EE. Prior to accepting the plea, the court confirmed

[9] In response, the prosecution asserts "the trial court rescinded the no contact order on April 15, less than a month after [Ms.] Salyers entered her guilty plea. *See* Appendix N." However, a review of Response Appendix N shows that the order was not rescinded on April 15, as claimed, and is plainly dated December 22.

she had read the plea statement, but did not confirm that Ms. Salyers had seen, read, or knew of the written "plea agreement." Id.

The prosecution's naked assertion that there was a factual basis to accept the plea is without merit. Her plea should be withdrawn.

F. *BRADY* MATERIAL WAS UNDISCLOSED.

"In the context of an *Alford* plea, a manifest injustice exists if the newly discovered evidence, when viewed in balance with the record, changes the factual basis for the plea." *State v. Ice*, 138 Wash. App. 745, 748, 158 P.3d 1228, 1230 (2007). Here, Ms. Salyers had not been provided with the exculpatory evidence that proved (1) she had not been given notice of the Transfer Order by Aldridge and (2) that the Shelter Care Order had been entered ex parte. The discovery of this evidence changes the factual basis for Ms. Salyers' plea, resulting in the manifest injustice of the plea.

Nevertheless, the prosecution argues that the exculpatory evidence was not willfully or inadvertently suppressed by the State in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) because the State provided the material eventually, that is, a week *after* Ms. Salyers had entered her guilty plea. Response at 37. By the prosecution's own admission then, the State willfully or inadvertently withheld the exculpatory evidence until after the exculpatory evidence could no longer be utilized in Ms. Salyers' defense.

G. THE PROSECUTION'S OBJECTIONS TO TRANSCRIPTS AND EXHIBITS ARE WITHOUT MERIT.

At the trial level, the prosecution did not object to any of the appendices or exhibits to which they now object; and their factual objections are incongruous with the facts clearly established by those exhibits.

1) OBJECTION TO FACTS CLEARLY SHOWN IN VIDEOS IS BASELESS.

The prosecution disputes the facts of the shelter care hearing but does not dispute the Exhibit 3, video of the shelter care hearing, which shows those facts. The prosecution:

> "disputes any and all facts [Ms.] Salyers relates regarding the shelter care hearing that was held on February 19, 2016… The State further disputes [Ms.] Salyers' representation of how the events at the shelter care hearing proceeded. [Ms.] Salyers claims she and her husband left court without any order having been entered, and the court waited until after they left to enter an order."

Response, at 11-12.

The Exhibit 3 video, however, plainly shows the exact facts as detailed by Ms. Salyers: Ms. Salyers and Mr. Petrenko walked out of the courtroom after the commissioner told them the hearing was adjourned. Only after they have left, does the commissioner look to the Assistant Attorney General (AAG) and say, "Do you have anything for me to keep the kids in shelter care over the weekend? What have you got?" Exhibit 3. The AAG responded that she did, and can be seen in the video filling out the papers. Those papers were never served upon Ms. Salyers until after her arrest.

In fact, the very Custody Order that the government claims Ms. Salyers had violated on February 21, 2016, has, hand-written on page two: "The court shall conduct a shelter care hearing: **presentation of orders on: 2-23-16**." Appendix C (emphasis added). The scheduled date for presentation of the order was two full days *after* Ms. Salyers' alleged violation. No evidence contradicts that the order Ms. Salyers was arrested for having violated, was not even scheduled to have been presented to her until two days after her arrest. The objection is senseless.

2) OBJECTION TO DESCRIPTION OF VPD'S SEIZING OF MS. SALYERS' PERSON, AND EXHIBIT Y IGNORES EXHIBIT 4.

The prosecution objects to the description of VPD officers grabbing Ms. Salyers. Again, review of the Exhibit 4 video clearly shows these facts. Appendix Y is simply a transcript of the video. Objection to the transcript of the video without identifying a single error is incredulous.

3) OBJECTION TO EXHIBIT 1 IS BASELESS.

The prosecution objects to Exhibit 1, the Declaration of Esther Crowell-Duncan, but presents no authority or basis for questioning the reliability of Ms. Crowell-Duncan's sworn declaration.

4) OBJECTION TO EXHIBIT 2 IS BASELESS.

The prosecution objects to the Custody Transfer Order signed by Sandra Aldridge. The sheet shows that notice of the transfer was not

provided to the parents because they were "unavailable / could not be located." The prosecution argues that the document "cannot be verified as authentic." Response to PRP (Response), at 7. The State has no basis for questioning the authenticity of its own Custody Transfer sheet.

5) OBJECTION TO Z, AA, CC, BB, AND EE ARE BASELESS.

The prosecution objects to Appendices Z, AA, BB, and CC,transcripts of a 911 call and dispatch recordings. The prosecution, however, has access to local 911 and dispatch recording; it could have identified any discrepancy. Likewise, if Appendix EE, a transcript of the *Alford* Plea hearing, contained meaningful factual error the prosecution could have identifed it.

H. CONCLUSION

Ms. Salyers asks that she be allowed to withdraw her plea and that this matter be dismissed based on her actual innocence, newly discovered evidence, ineffective assistance of counsel, a failure to disclose exculpatory evidence, prejudice to her right to trial, and her plea having been unknowing and therefore involuntary.

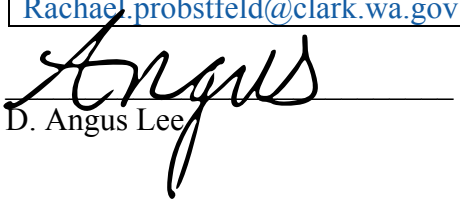
Respectfully submitted on Wednesday, August 16, 17.

D. Angus Lee, WSBA#36473

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on Wednesday, August 16, 2017, the foregoing was delivered to the following person or entity in the manner indicated:

Clark County Prosecutor's Office Rachael Probstfeld Rachael.probstfeld@clark.wa.gov	Via email and fax



D. Angus Lee

ANGUS LEE LAW FIRM, PLLC

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